



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

36819

B-178084

April 17, 1973

The Honorable Robert E. Hampton, Chairman  
United States Civil Service Commission

Dear Mr. Hampton:

Further reference is made to your letter of March 13, 1973, requesting our views as to whether the night differential authorized by 5 U.S.C. 5343(f), as enacted by Public Law 92-392, approved August 19, 1972, 86 Stat. 568, is included in basic pay of a prevailing rate employee for purposes of annual and sick leave and overtime pay for regular or irregular overtime hours which an employee may work.

Section 5343(f) provides as follows:

(f) A prevailing rate employee is entitled to pay at his scheduled rate plus a night differential—

(1) amounting to 7-1/2 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 3 p.m. and midnight; and

(2) amounting to 10 percent of that scheduled rate for regularly scheduled nonovertime work a majority of the hours of which occur between 11 p.m. and 8 a.m.

A night differential under this subsection is a part of basic pay.

You point out that the night differential is provided for "regularly scheduled nonovertime work." You note that similar wording in overtime statutes has been construed to mean that an individual must actually perform at his job in order to qualify for overtime compensation (other than callback overtime). This interpretation of the word "work" has led you to the conclusion that night differential would not be payable for hours in a leave status since the employee is not actually "at work." This interpretation is buttressed by the provision in 5 U.S.C. 5545(a) which states that for General Schedule employees nightwork is regularly scheduled work between the hours of 6 p.m. and 6 a.m., and includes

[Request for Opinion on Night  
Differential Pay] BEST DOCUMENT AVAILABLE

PUBLISHED DECISION  
52 Comp. Gen. \_\_\_\_\_

715840/072235

B-178084

periods of leave with pay during those hours if the periods of leave with pay during a pay period total less than 8 hours. Accordingly, Federal Personnel Manual (FPM) Supplement 532-1, January 16, 1973, Subchapter S8-3h, provides that wage employees are paid at their basic rates (excluding night shift differential) during periods of compensable leave.

You state that you have had a number of questions regarding the correct interpretation of 5 U.S.C. 5343(f). In considering such questions you have found statements in Senate Report No. 92-791, May 16, 1972, pages 4 and 5, and House Report No. 92-339, July 8, 1971, pages 15 and 16, which indicate that it is the intent of Congress that the night differential be included for leave purposes. The House statement reads as follows:

Section 5343(f) authorizes the payment of uniform night differentials to prevailing rate employees assigned to the second or third shifts. A differential of 7-1/2 percent of the employee's scheduled rate will be paid for the entire shift when a majority of the employee's regularly scheduled nonovertime hours fall between 3 p.m. and midnight. A differential of 10 percent will be paid when a majority of the regularly scheduled nonovertime hours fall between 11 p.m. and 8 a.m. Section 5343(f) specifically provides that night shift differentials are to be considered a part of base pay. Thus, such differentials will be included in rates of basic pay for purposes of computing overtime, Sunday, and holiday pay, and deductions for retirement and group life insurance. It is anticipated by the committee that the Civil Service Commission, in administering the provisions of this section, may issue regulations governing such matters as the treatment of night differential when a prevailing rate employee (otherwise entitled thereto) is: (1) excused from work on a holiday, (2) traveling on official business, (3) absent on leave, or (4) temporarily assigned to a different tour of duty.

In view of the congressional statements you seek our advice in the matter.

With respect to including night differential in an employee's basic rate of pay for computing overtime pay for regular or irregular overtime hours worked, you note that section 5544(a) of title 5, United States Code, which previously read "an employee whose basic pay is fixed \* \* \*" was changed to read "an employee whose pay is fixed \* \* \*." While you

do not attach any special significance to the change in the wording of the statute from "basic pay" to "pay," you would like our views as to whether it is proper to include the night differential in an employee's rate of pay for the purpose of computing the amount of his overtime pay.

Under the Coordinated Federal Wage System, which was in effect prior to the effective date of Public Law 92-392, a night differential was included in basic pay for purposes of annual and sick leave, and overtime pay. Federal Personnel Manual Supplement 532-1, Subchapter S8-4c. Our decisions also have held that night differential is included in leave and overtime situations involving a wage board employee. 26 Comp. Gen. 212 (1946); 23 id. 962 (1944).

In summarizing the purpose of the legislation here involved House Report No. 92-339, page 6, states in pertinent part the following:

The major provisions of the bill may be summarized as follows:

One--enacts into law the long established principle and policies for setting the pay of prevailing rate employees.

Two--makes the following changes in the current operating systems and procedures:

\* \* \* \* \*

(d) Provides a 7-1/2% pay differential, nationwide, for scheduled non-overtime work during the second shift (3 p.m. until midnight) and 10% for the third shift (11 p.m. until 8 a.m.). Currently the premium pay depends on the prevailing custom of each labor market area.

Senate Report No. 92-791, page 3, in giving the background information concerning this legislation, states the following:

\* \* \* The Coordinated Wage System was established in 1968 by the Civil Service Commission as a result of an Executive order issued by President Johnson. This succeeded in requiring equitable coordination of wage board practices among all Federal agencies. The next logical step is enactment of this legislation to establish the system in law.

B-178084

In light of the above our view is that night differential should be included in basic pay for annual and sick leave purposes and that it is proper to include night differential in an employee's rate of pay for the purpose of computing the amount of his overtime pay.

Sincerely yours,

PAUL G. DEMBLING  
For the Comptroller General  
of the United States

BEST DOCUMENT AVAILABLE